



June 29, 2009
Number 33

School Law *Bullet*

A News Publication of King, Spry, Herman, Freund & Faul, LLC
John E. Freund, III, Chair of Education Law Practice Group
Kristine M. Roddick, Chair of Special Education Section

To: Public Education Clients and Friends

By: John E. Freund and Kristine M. Roddick, Esquires

Supreme Court Allows Tuition Reimbursement Without Prior Notice of Private Placement *Here's Our Bulletproof Analysis*

"Things are not always what they appear to be." This famous quotation describes the Supreme Court's most recent interpretation of the IDEA, Forest Grove School District v. T.A. No. 08-305, June 22, 2009 by Justice Stevens. In a (6-3) decision handed down this past week, the Supreme Court held that the IDEA authorizes reimbursement for private special education services when a public school fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special education services through the public school.

Legislative History of Tuition Reimbursement

In 1985, the United States Supreme Court addressed the issue of tuition reimbursement in Burlington v. Dept. of Ed. Mass., 471 US 359 (1985). In Burlington, the Court held that a court could require a public school district to reimburse parents for the cost of private education where the school district failed to provide FAPE. In so holding, the Court relied primarily on IDEA §1415 (i)(2)(c)(iii) which provides that in special education cases, a court "may grant such relief as the court determines is appropriate."

Burlington was followed in a 1993 decision Florence County Sch. Dist. v. Carter, 510 US 7 (1993). At the time these two cases were decided, the IDEA continued no mention of tuition reimbursement.

In the 1997 reissuance of the IDEA, Congress amended the statute to specifically address the question of

tuition reimbursement for a unilateral private school placement:

*"If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of a referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." §1412 (a)(10)(C) **

This language remained unchanged in the 2004 IDEA Reauthorization.

Forest Grove Facts

In both Burlington and Carter, the student *had been identified* by the school district as eligible for special education services and the parents participated in the development of

an IEP. This was not the case in Forest Grove.

In Forest Grove, the student had been in the district since kindergarten. It was not until the completion of his sophomore year that the parents had him privately evaluated, which resulted in a diagnosis of ADHD and various disabilities of learning and memory. The parents enrolled the student in a private academy focusing on children with special needs. Thereafter, the parents filed a due process complaint.

After due process was initiated, a district school psychologist evaluated the student and found that the student did not have a disability that negatively impacted his educational performance. An IEP team did not find him eligible for special education services and consequently, no IEP was offered.

continued...

The hearing officer found the student eligible for special education services and ordered tuition reimbursement for the unilateral private school placement. The school district appealed to Federal Court. The U.S. District Court let the eligibility determination stand, but vacated the tuition reimbursement order.

The Ninth Circuit Court of Appeals reversed, holding that the 1997 IDEA Amendments did not prohibit tuition reimbursement when a student had not previously received special education services or had failed to give prior notice of withdrawal from the district and unilateral enrollment in a private school. The district appealed this decision to the United States Supreme Court.

Supreme Court's Rationale

The Supreme Court's decision began from the premise that the 1997 IDEA amendments preserved the IDEA's purpose of providing FAPE to all children with disabilities. In holding that the IDEA authorizes reimbursement for private special education services when a public school fails to provide a FAPE and the private school placement is appropriate, *regardless of whether the child previously received special education services through the public school*, the Court justified its decision as follows:

1. The Court viewed a strict reading of the IDEA's tuition reimbursement provision, or §1415 (a)(10)(c), as being at odds with the general remedial purpose underlying the IDEA and its amendments, which is to ensure FAPE for all children with disabilities.

2. Although a strict reading of the tuition reimbursement provision seems to preclude tuition reimbursement for a child not identified as being eligible for special education services, the Court opined that this strict reading was at odds with the IDEA's Child Find obligation requir-

ing school districts to locate, identify and evaluate all resident children.

3. Most important, the 1997 IDEA amendments did not affect §1415(i)(2)(c)(iii) of the IDEA (the portion of the IDEA relied on in Burlington or Carter) which gives the court broad authority to grant "appropriate" relief including tuition reimbursement.

Opinion of the Dissenting Justices

The dissent written by Justice Souter, joined by Justices Scalia and Thomas, was straightforward in its analysis.

1. The dissenters conceded that Congressional intent to limit tuition reimbursement to already identified, previously served children or parents who gave no notice prior to the unilateral private school placement was ambiguous. However, the dissenters concluded that intent to impose such a limit was unmistakable, since the IDEA contained no mention of compensation for private schooling costs prior to the 1997 reauthorization.

2. The dissent clearly saw legislative purpose of encouraging parental cooperation in the special education process before unilaterally disenrolling a student and placing him or her in a private school as manifest in the legislative history and text of the amendment.

Impact on School Districts

After all this, what has the court said about tuition reimbursement for students privately placed? In the absence of prior services, special education identification alone is not enough to deny reimbursement.

School districts cannot rely on the absence of notice of a private placement or lack of prior special education identification to automatically deny parent's tuition reimbursements.

School Law Bullets are published by the Education Law Practice Group of KingSpry for our education clients and friends. Back issues are available on our website at www.kingspry.com.

KING, SPRY, HERMAN,

FREUND & FAUL, LLC

One West Broad Street, Suite 700

Bethlehem, PA 18018

Phone: 610-332-0390 • Fax: 610-332-0314

www.kingspry.com

Affiliated with The Law Offices of

Ira Weiss, Pittsburgh, PA

Practice Areas

Affordable Housing Law • Business Law •
Education Law • Employment Law • Estate
Planning/Administration • Family Law •
Insurance Law • Litigation • Municipal Law •
Non-Profit Law • Public Finance Law •
Real Estate Law

Education Law Practice Group

John E. Freund, III, Education Chair •

jef@kingspry.com

Donald F. Spry, II • dfs@kingspry.com

Domenic P. Sbrocchi • dps@kingspry.com

Jeffrey T. Tucker • jtucker@kingspry.com

Glenna M. Hazeltine •

ghazeltine@kingspry.com

Kevin C. Reid • kcr@kingspry.com

Ellen C. Schurdak • ecs@kingspry.com

Kristine Roddick, Special Education Chair •

kmarakovits@kingspry.com

Rebecca A. Young • ryoung@kingspry.com

Deirdre J. Kamber • dkamber@kingspry.com

Jessica F. Moyer • jmoyer@kingspry.com

Lucas J. Repka • lrepka@kingspry.com

Erin D. Gilsbach • egilsbach@kingspry.com

** This School Law Bullet is meant to be informational and does not constitute legal advice.*

Those who require legal advice on this matter should contact their legal counsel or request a legal opinion from KingSpry.